

UNITED STATES OF AMERICA, :
 :
 v. : Crim. Action No. 04-0157 (JR)
 :
 ANTHONY C. HARRIS, :
 ANTONIO D. ROUNDTREE, :
 :
 Defendants. :

A jury convicted Anthony C. Harris and Antonio D. Roundtree on October 18, 2004 of unlawful possession with intent to distribute 5 grams or more of cocaine base. That verdict made mandatory the imposition of a sentence of not less than 5 years. 21 U.S.C. § 841(b)(1)(B)(iii). On February 18, 2005 I sentenced Harris to 96 months incarceration, 5 years supervised release, and a \$1000 fine, and Roundtree to 60 months incarceration, 5 years supervised release, and a \$1000 fine. The reasons for those sentences are set forth below.

After United States v. Booker, 125 S. Ct. 738 (U.S. 2005), the Sentencing Guidelines are “effectively advisory.” Id. at 757. A sentencing court must consider Guidelines ranges, but may “tailor the sentence in light of other statutory concerns as well, see § 3553(a)(Supp. 2004).” Id.

The presentence report writer accepted the prosecution theory that Harris and Roundtree were both responsible for the

entire amount of drugs recovered from a plastic bag that had been stashed by an unidentified third person on a street sign near the scene of the drug dealing. Those drugs, in 101 ziplock bags, weighed 38 grams. The Offense Level for at least 35 but less than 50 grams of crack cocaine, U.S.S.G. § 2D1.1(c)(5), is **30**. As I believe virtually every federal judge has done since Blakely v. Washington, 124 S. Ct 2531 (2004), however, I found the applicable Offense Level to be **26**, § 2D1.1(c)(7), because all that was charged, and all the jury found proven beyond a reasonable doubt, was "more than 5 grams."¹

While the Offense Level was the same for both defendants, their Criminal Histories were quite different. Harris, who is 25 years old, had accumulated 15 convictions before this one. He started with operating an unregistered motor vehicle at age 17 and proceeded to disorderly conduct, unlawful entry, escape, simple possession of cocaine, and theft. He had 14 criminal history points and a Criminal History Category of **VI**, with a resulting Guidelines range (26/VI) of **120-150 months**. Roundtree, who is 20 years old, had one conviction three years ago, for threat to injure and theft 2nd degree, and he committed the instant offense while on probation, yielding a Criminal

¹ In Roundtree's case, the presentence report writer also accepted the prosecution theory that Roundtree perjured himself when he testified and thus obstructed justice, § 3C1.1 and see Application Note 4(b), increasing his Offense Level by 2 points. The jury did not make such a finding, and neither did I.

History Category of **II** and a Guidelines range (26/II) of **70-87 months**.

18 U.S.C. § 3553

A court is required by 18 U.S.C. § 3553 to consider "the nature and circumstances of the offense and the history and characteristics of the defendant" and to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)." Those purposes are

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Nature and circumstances of the offense

Roundtree and Harris were bottom-rung street sellers: They were observed serving customers in a line of cars, exchanging ziplock bags of drugs for currency. Officer Green's testimony was that they were walking back and forth to and from a third man. Officer Stevens said he saw Roundtree repeatedly go to another man and exchange something he could not see. Officer Teixeira, who had the clearest view through 10 x 50 binoculars, said he saw three males, one on the curb, the other two flagging down cars. He saw Harris approaching cars, taking money, handing

money to the man on the curb, getting "product" and delivering it to the cars. He saw Roundtree doing the same thing, multiple times. Neither Harris nor Roundtree had drugs or money on them when they were arrested. The man on the curb was never identified, apprehended or charged.

Each defendant was responsible for 5 grams of crack for purposes of the mandatory minimum, but it is at least questionable whether either of them actually handled as much as 5 grams.² No substance catalogued under the Guidelines is more weight-sensitive than crack, of course: from 5 to 20 grams is Offense Level 26, but one gram less, 4 to 5 grams, is Level 24,

² Before Booker, it was clear that Offense Levels in drug cases were to be determined by the amount of drugs in the defendant's relevant conduct, not just the amounts in the offense of conviction or charged in the indictment, and that such relevant conduct might include drug quantities in dismissed counts, see United States v. Smith, 267 F.3d 1154, 1165 (D.C. Cir. 2001) (citing United States v. Baird, 109 F.3d 856, 864-865 (3d Cir. 1997)), or counts on which the defendant was acquitted, see United States v. Boney, 977 F.2d 624, 635 (D.C. Cir. 1992). I have not found a case dealing with the question whether relevant conduct must be a one-way ratchet -- that is, whether a judge may determine that the amount of drugs in a defendant's possession could be less than what was charged or established by a jury's verdict -- and the answer to that question under the pre-Booker Guidelines regime seemed obvious. After Booker, however, it seems to be a valid question when evaluating whether a Guidelines sentence is sufficient or greater than necessary, particularly in a case like this one, where (a) the defendants were not charged with or convicted of conspiracy, and (b) the jury's verdict does not reveal whether the jury found that the defendants' possession with intent to distribute 5 grams of crack was actual, or constructive, or shared. See Criminal Jury Instructions for the District of Columbia, Instructions 3.08, 4.28 (2004).

and one gram less than that, 3 to 4 grams, is Level 22. Harris's sentence was 96 months, two years less than the low end of the 120-150 month range established by the Guidelines. If what he actually possessed and sold was between 4 and 5 grams, his Guidelines range would have been 100-125 months (24/VI), and if he actually possessed and sold 3.8 grams (10 vehicles x 0.38 grams),³ his Guidelines range would have been 84-105 months (22/VI). Roundtree's sentence was 60 months, which was within the 57-71 month Guidelines range that would have applied had he actually possessed and sold between 4 and 5 grams (24/II).

History and characteristics of the defendants

Roundtree's criminal history is adequately summarized above. He is a high school graduate, has fathered a daughter who lives with his girlfriend, and was employed as a moving technician (with government agency clearances) both at the time of the offense and at the time of sentencing. He has performed volunteer work in his community.

Harris's criminal history category is adequately summarized above. He has not completed high school or received his GED. He has not been employed since at least 2000.

³ The average weight of the ziplocks found in the stash was less than 0.38 grams. Officer Green said he saw the defendants serve at least 10 vehicles each. Officer Teixeira: multiple times. Officer Stevens: 10 minutes. For the two defendants to have sold 5 grams each in 10 minutes, a drug transaction would have had to be completed every 23 seconds.

Compliance with purposes set forth in § 3553(a)(2)

Locking Roundtree up for 60 months and Harris for 96 months will provide as much deterrence to criminal conduct, and as much protection to the public from further crimes of the defendants, as a higher sentence would.⁴ Both defendants can complete the Bureau of Prisons' entire curriculum of educational or vocational training offerings in less time than their sentences will run. The question is whether sentencing Roundtree to 60 instead of 70 months, and Harris to 96 instead of 120 months, is "sufficient, but not greater than necessary . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A).

In Booker, the Supreme Court admonishes sentencing judges to consider, not only Guidelines ranges, but also (*inter alia*) "pertinent Sentencing Commission policy statements." Booker, 125 S. Ct. at 764. In that connection, it is impossible

⁴ One rationale for long prison sentences -- and one that may be particularly applicable to Harris, who now has 16 convictions and is well on his way to career criminal status if he learns nothing from 8 years of incarceration -- is to keep criminals off the street for as long as possible. That rationale makes more sense in the context of life sentences for violent criminals than it does for small-time drug dealers like Harris. Ten years will not teach Harris a more effective lesson than eight. If he has not decided to be a law-abiding citizen after 8 years, he will recidivate, and he will be locked up again. The incremental value to the public of an additional two-year hiatus until Harris's (putative) next crime, in my calculus, does not overbalance the value of two years of Harris's life.

to ignore what the Sentencing Commission has said about the so-called "crack:powder ratio," or the astonishingly high ratio of the weight of cocaine hydrochloride, or powder cocaine, to that of cocaine base, or crack, that will yield the same punishment.⁵

In its 2002 Report to the Congress: Cocaine and Federal Sentencing Policy, the Commission found

- that the Guidelines ranges for crack exaggerate the relative harmfulness of crack cocaine (in terms of addictiveness, prenatal cocaine exposure, use of crack by youth, and the feared epidemic of crack users);
- that the Guidelines ranges sweep too broadly and apply most often to lower level offenders (as I have found both Harris and Roundtree to be in this case);
- that the Guidelines ranges overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality (weapons, violence, and minor co-participants are involved in smaller numbers of cases than previously imagined); and
- that the severity of the Guidelines ranges for crack mostly impacts minorities.

United States Sentencing Commission, Report to the Congress: Cocaine and Federal Sentencing Policy 90-103 (2002). Those findings are persuasive authority for the proposition that the sentencing ranges prescribed for Harris's and Roundtree's crime by the Guidelines are greater than necessary. Congress's concern

⁵ If Harris and Roundtree had been convicted of possession with intent to distribute 5 grams or more of powder cocaine, their crime would have been assigned Offense Level 12 (2D1.1(c)(14)), and their Guidelines ranges would have been 30-37 months and 12-18 months, respectively. The sentences they actually received correlate to 300-400 grams of powder cocaine for Harris and 400-500 grams for Roundtree.

for the dangerousness and harmfulness of crack cocaine has been factored into the mandatory minimum penalties, which are unaffected by Booker and which have been duly applied here. Roundtree will spend five years in prison, and Harris eight, for running dime bags on a street corner for another man. Those sentences, I believe and find, are sufficient to reflect the seriousness of and provide just punishment for their offense. Reasonable minds may differ as to whether a non-Guidelines sentence on the facts of this case will promote respect for the law. It is my belief that respect for the law is promoted by an independent judiciary that obeys controlling precedent, acts within its sound discretion, and deals reasonably with the facts of each case as they are presented, as I have attempted to do here.

JAMES ROBERTSON
United States District Judge

Dated: _____